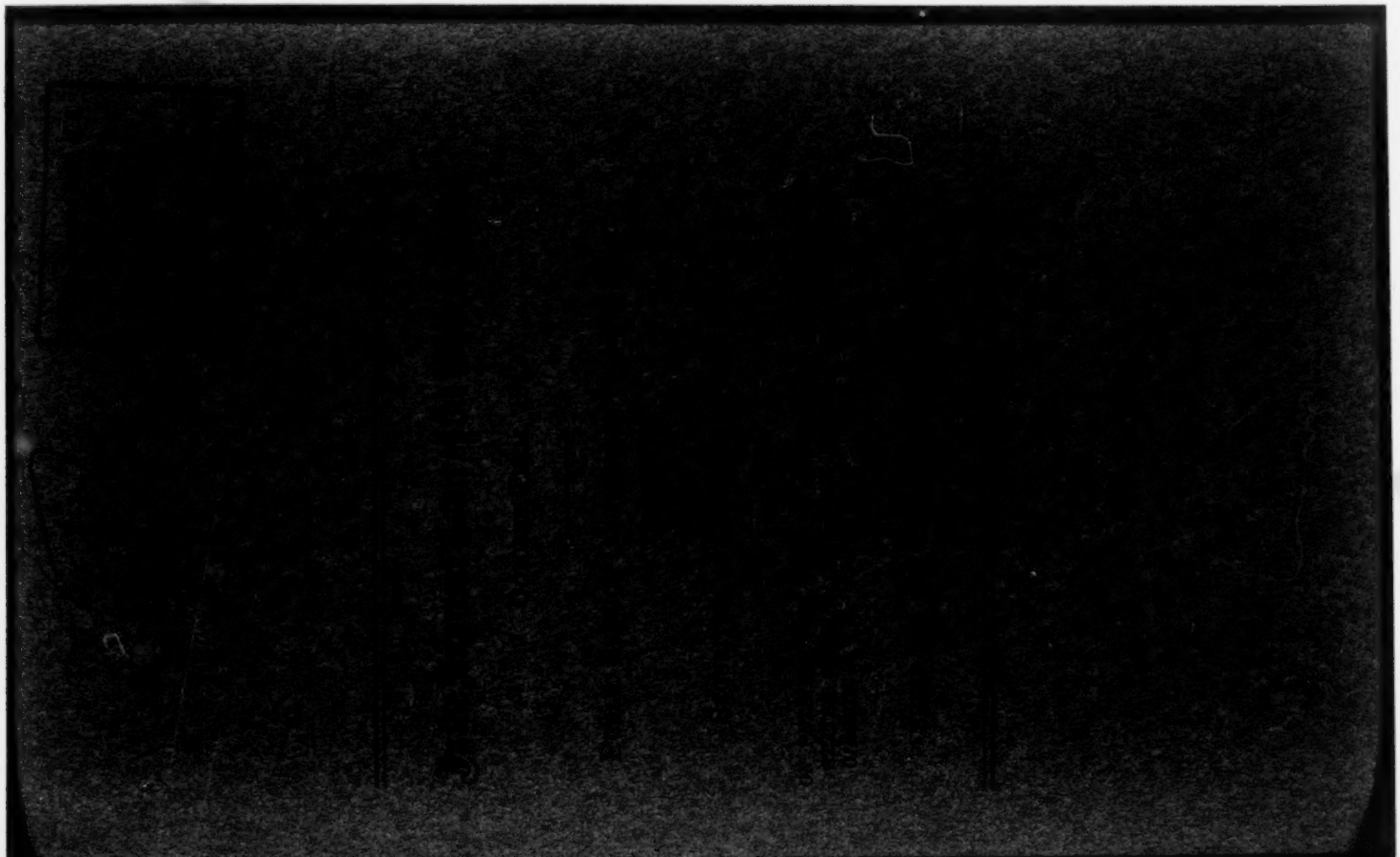

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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 521

PUBLIC SERVICE CORPORATION OF NEW JERSEY,
PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings and opinion of the Commission (R. 23),[1] not yet officially reported, are set forth in the Commission's Holding Company Act Release No. 2998. The opinion of the Circuit Court of Appeals (R. 2057), affirming the decision of the Commission, is reported in 129 F. (2d) 899.

[1] The portions of the original voluminous record which counsel agreed to print are set forth in the Appendix to Petitioner's Brief in the court below. In accordance with the stipulation of counsel, the printed record in this Court comprises that Appendix, as supplemented by the proceedings below, to which all record references herein relate.

JURISDICTION

The decree of the Circuit Court of Appeals was entered August 12, 1942 (R. 2066). The petition for a writ of certiorari was filed November 12, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, made applicable by Section 24 (a) of the Public Utility Holding Company Act of 1935.

QUESTION PRESENTED

More than ten percent of petitioner's outstanding voting securities are owned by each of two public-utility holding companies registered as such under the Public Utility Holding Company Act, namely, the United Corporation and its subsidiary, The United Gas Improvement Company. Petitioner applied to the Commission under Section 2 (a) (8) of the Act for an order declaring that it is not a "subsidiary company" of The United Corporation or of The United Gas Improvement Company. The basic question presented is whether petitioner has shown that it is not controlled, and that its management or policies are not "subject to a controlling influence," by these holding companies within the meaning of those provisions.

STATUTE INVOLVED

The applicable provisions of the Public Utility Holding Company Act of 1935 are set forth in an Appendix, *infra,* p. 18.

STATEMENT

The petitioner, Public Service Corporation of New Jersey, is a holding company, controlling a number of public-utility and transportation subsidiaries. The United Corporation ("United") directly owns 13.9 percent of petitioner's outstanding voting securities. The United Gas Improvement Company ("U. G. I."), 26.1 percent of whose securities are owned by United, in turn owns 28.4 percent of petitioner's outstanding voting securities.

Petitioner is thus a "subsidiary company" of both United and U. G. I. under Section 2 (a) (8) (A) of the Holding Company Act, since more than 10 percent of its voting securities are owned by each of them. It brought this proceeding under the last paragraph of Section 2 (a) (8), applying to the Commission for an order declaring that it is not a subsidiary company of either holding company. The Commission denied the application on the ground that petitioner had not shown that it is not controlled by United or U. G. I., or that its management or policies "are not subject to a controlling influence" by them within the meaning of those provisions. The findings and opinion of the Commission (R. 23–49), as approved by the Circuit Court of Appeals (R. 2057–2066) may be summarized as follows:

Since 1929, when United was organized, United and its subsidiary, U. G. I., have owned a ma-

jority of petitioner's outstanding common stock. Since 1932 U. G. I. has owned 36.66 percent and United 17.96 percent, a total of 54.62 percent. The combined holdings of U. G. I. (including 10,000 shares of voting preferred stock) and United constitute 42.3 percent of petitioner's outstanding voting securities. The balance of petitioner's securities are widely scattered. The holdings of the thirty next largest stockholders range from 1.7 percent to .11 percent, and their combined holdings aggregate 8.85 percent of petitioner's voting securities. At every annual meeting of petitioner's stockholders from 1929 through 1940 United and U. G. I. have cast a majority of the total stock voted. In 1941, when United voluntarily refrained from voting its stock, U. G. I.'s stock alone represented 49.2 percent of the total stock voted. From 1929 to 1940 U. G. I.'s stock alone represented from 35.8 percent to 41.3 percent of the total stock voted. In 1936, although petitioner conducted an extraordinary proxy drive in connection with proposed charter amendments requiring a two-thirds vote, United and U. G. I. cast 53.5 percent of the total stock voted, U. G. I. alone casting 36 percent. (R. 28–30.)

United's and U. G. I.'s ownership of petitioner's voting securities has enabled them at any time to pass or defeat resolutions, and to break quorum, and affords them an absolute veto power as to all matters of corporate action requiring a class vote or two-thirds vote (R. 30–31).

Directors and officers of U. G. I. held positions on petitioner's board of directors, executive committee, and other management committees from the organization of petitioner in 1903 until 1938 when this Court in *Electric Bond & Share Company* v. *Securities and Exchange Commission,* 303 U. S. 419, sustained the constitutionality of the registration provisions of the Public Utility Holding Company Act. United had similar representation from 1930 to the time of the *Bond & Share* decision. Of the twenty-seven members of the petitioner's executive committee since 1903, twelve have been directors and members of the executive committee of U. G. I. or directors of United. From 1930 to 1934, six of petitioner's nine executive committee members were members of U. G. I.'s board and executive committee or United's board. U. G. I. has also had substantial representation on the boards of petitioner's important utility subsidiaries. Since 1924, when petitioner's most important operating utility subsidiary, Public Service Electric and Gas Company, was formed, twelve of the twenty-five members of its board of directors have been directors and members of the executive committee of U. G. I. or directors of United. (R. 33–35.)

The Commission concluded that the present absence of interlocking directorships is not entitled to any great weight, and that the resignations of the interlocking directors were entirely unrelated

to renunciation of control and controlling influence. Admittedly U. G. I. can resume its interlocking directorships at any time (R. 990–991). Subsequent to the resignations, petitioner has consulted with officials of both holding companies with regard to its important problems (R. 45).

Petitioner could not have been formed without the affirmative approval of U. G. I., and its then President was one of petitioner's three original incorporators. Of petitioner's 24 original directors, five were U. G. I. officials or employees. Immediately upon organization, petitioner entered into a five-year contract whereby U. G. I. supplied it with engineering, purchasing, and a general advisory service. (R. 31–33.)

From 1927 to 1930, directors and executives of U. G. I. and United participated actively in an attempt to secure a contract for petitioner with the Pennsylvania Railroad to supply power to its newly electrified lines, even though a practically wholly owned subsidiary of U. G. I., Philadelphia Electric Company, was a logical competitor for the business. Philadelphia Electric Company entered the competition only when it became apparent that petitioner could not get the contract and that an independent utility might. When Philadelphia Electric Company got the contract, provision was made for petitioner to supply emergency power. In this connection, one of petitioner's officials had stated to a Philadelphia Electric official that the question of

emergency service could be settled equitably "since we are one and the same interest" (R. 37). Throughout the entire negotiations, U. G. I. and United officials advised petitioner's management as to the procedure and strategy to be employed (R. 35–39).

In 1928, at the suggestion of U. G. I., petitioner and U. G. I. consolidated their respective subsidiary construction and service companies by organizing United Engineers and Constructors, Inc., a joint servicing and construction company. Initially, petitioner was given a minority interest in the new company, although its subsidiary construction company had been by far the most profitable of the companies consolidated. Petitioner's President complained, stating: "All this comes about, I suppose, from *the intimacy of our relations* and the haste with which the matter was attempted to be consummated. What all of us want is a fair settlement of this whole matter that will stand any investigation by anybody, and certainly we do not want any disagreement about it" (R. 40). Although petitioner later became a 50-percent owner, with U. G. I., of the stock of United Engineers and Constructors, Inc., the company was managed almost exclusively by U. G. I. When the joint enterprise proved undesirable, U. G. I. handled the problems arising until 1938, when petitioner and U. G. I. simultaneously disposed of their stock ownership. (R. 39–42.)

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Throughout the years, U. G. I. participated in petitioner's financing and, on occasion, has loaned it substantial sums of money. On occasion, U. G. I. acted for petitioner in the acquisition of utility properties. From 1925 to 1939, officials of both United and U. G. I. aided petitioner in the reorganization of its transportation subsidiaries. In 1930, U. G. I. took the lead in negotiations with Columbia Gas & Electric Corporation, another subsidiary of United, to persuade Columbia to refrain from an attempt to introduce natural gas into the territory served by petitioner. (R. 42–43.)

From 1903 until 1925, petitioner and U. G. I. employed a joint purchasing agent and continued to engage in joint purchasing until 1939. In many of U. G. I.'s purchasing contracts, petitioner was held out as its "subsidiary" or as an "allied" company. Petitioner furnishes U. G. I. with regular monthly detailed reports covering its operations, a practice which is not employed with other stockholders, and U. G. I. advances suggestions and criticisms from time to time. (R. 43–44.)

On the basis of the foregoing, the Commission determined that petitioner had not sustained the burden of proving that it is not a subsidiary of United and U. G. I.

ARGUMENT

The narrow issue involved is whether petitioner sustained the burden of showing before the Commission that it is not controlled, or subject to a controlling influence, by United and U. G. I. The decision of the court below that petitioner had not sustained that burden is correct and does not call for further review.

Since 28.4 percent of petitioner's voting securities are owned by U. G. I. and 13.9 percent by United, petitioner is a "subsidiary company" of both U. G. I. and United under Section 2 (a) (8) (A) of the Public Utility Holding Company Act. Under the provisions of Section 2 (a) (8), the Commission is required, upon application, to declare that a company is not a subsidiary if it finds that *all* of three conditions have been met. Two of these conditions are that:

> (i) the applicant is not controlled, directly or indirectly, by such holding company (either alone or pursuant to an arrangement or understanding with one or more other persons) either through one or more intermediary persons or by any means or device whatsoever, * * * and
> (iii) the management or policies of the applicant are not subject to a controlling influence, directly or indirectly, by such holding company (either alone or pursuant to an arrangement or understanding with one or more other persons) so as to

> make it necessary or appropriate in the public interest or for the protection of investors or consumers that the applicant be subject to the obligations, duties, and liabilities imposed in this title upon subsidiary companies of holding companies.

Petitioner had the burden of proving, by a preponderance of the evidence, all conditions necessary to bring it within the exception provided by Section 2 (a) (8) of the Act.[2]

The Commission concluded that it could not make the requisite statutory findings on the basis of its evidentiary findings recited above (*supra*, pp. 3–8). The court below, in refusing to disturb the ruling of the Commission, stated (R. 2059):

> We have examined the record in the light of Public Service's argument that the Com-

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[2] In *Detroit Edison Co.* v. *Securities & Exchange Commission*, 119 F. (2d) 730, 739 (C. C. A. 6th), certiorori denied, 314 U. S. 618, the court held, with respect to the exception provided in Section 2 (a) (8):

"Provisos and exceptions in statutes must be strictly construed and limited to objects fairly within their terms, since they are intended to restrain or except that which would otherwise be within the scope of the general language. The burden rested on petitioner to bring itself within the exception. *Schlemmer* v. *Buffalo, Rochester & P. R. Company*, 205 U. S. 1, 27, 27 S. Ct. 407, 51 L. Ed. 681." See also *Securities and Exchange Commission* v. *Sunbeam Gold Mines*, 95 F. (2d) 699, 701 (C. C. A. 9th); *Piedmont & Northern Ry.* v. *Interstate Commerce Commission*, 286 U. S. 299; *Grand Trunk Ry. Co.* v. *United States*, 229 Fed. 116 (C. C. A. 7th).

> mission's fact findings are not supported by substantial evidence and we find no merit in Public Service's contentions in this regard. Indeed some of these contentions are so wholly lacking in merit as to border on the frivolous. It is sufficient to say that the evidence fully supports the findings of the Commission. * * *[3]

Petitioner's own analysis of the evidence, contained in the Appendix to its petition, shows clearly that there was substantial evidence supporting the Commission's conclusions. Petitioner is asking the Court to reweigh the evidence—to substitute its judgment for that of the Commission. This, of course, the Court will not do.

Although the issue in the case is essentially factual, petitioner obscures that issue by alleging a number of errors based upon misinterpretations of the Commission's findings and of the Act.

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[3] In *Detroit Edison Co.* v. *Securities & Exchange Commission*, *supra*, a similar proceeding, the holding company in question owned 19.28 percent of the applicant's voting securities. Another independent holding company owned in excess of 20 percent. The Circuit Court of Appeals for the Sixth Circuit refused to disturb the Commission's ruling that the applicant had failed to sustain its burden of proving the condition contained in clause (iii) of Section 2 (a) (8), and this Court declined further review. The 42.3 percent of voting strength in the instant case has afforded United and U. G. I. the power to cast a majority of the votes, and U. G. I. alone substantially more than one-third, at all of petitioner's stockholders' meetings. This presents an *a fortiori* case.

1. It argues that the Commission held that power to acquire control in the future, rather than present control, is sufficient to justify denial of the application. But the Commission did not so hold. It did hold that present power to exercise control is "control" whether or not it is actively exercised. The court below sustained this interpretation of the statute, saying (R. 2063):

> A "controlling influence" may exist, although in a latent form. *Detroit Edison Co.* v. *Securities & Exchange Commission, supra.* Even though, after 1938, UGI and United did not utilize their voting strength to elect directors, pass resolutions or veto corporate changes the latent power to do so was a present power to exert a "controlling influence" upon Public Service at any time.

The court below did not err in this construction. *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 145; *Detroit Edison Co.* v. *Securities & Exchange Commission,* 119 F. (2d) 730 (C. C. A. 6th), certiorari denied, 314 U. S. 618.

2. Petitioner argues that the Commission could not treat United and U. G. I. as parent and subsidiary without proving a relationship of control between them. But the Commission was entirely warranted in treating United and U. G. I. as parent and subsidiary in determining whether a relationship of control or controlling influence, "di-

rectly or indirectly," existed between petitioner and U. G. I., or petitioner and United. Since United owns 26.1 percent of the voting securities of U. G. I. and neither company has applied for an order under Section 2 (a) (8) declaring U. G. I. not to be a subsidiary of United, the Commission is required to recognize their relationship as defined by the Act. Despite notice, neither United nor U. G. I. appeared at the Commission hearings to place in issue its relationship to the other. Petitioner made no attempt to prove that U. G. I. is not, in fact, subject to United's control or controlling influence.

In similar circumstances involving United and another of its subsidiaries, Columbia Gas & Electric Corporation, the Commission's comparable treatment of the statutory parent-subsidiary relationship as conclusive was upheld in *Morgan Stanley & Co.* v. *Securities Exchange Commission,* 126 F. (2d) 325, 328 (C. C. A. 2d). The court held, as to the relationship between Columbia Gas and United, which owns 19.6 percent of Columbia's voting stock:

> Although petitioner argues that the mere fact of Columbia's status as a "subsidiary company" within the definition of § 2 (a) (8), 15 U. S. C. A. § 79b (a) (8)—as owning 10% of the stock—is not controlling, we think there is little need to discuss this point.

> Columbia has never carried through any attempt to have the Commission find that it is within the exceptions of § 2 (a) (8); and in the absence of such action by Columbia, the Commission is warranted in relying on the statutory definition of a subsidiary company. Furthermore, the 20% holding of United is the largest block of voting securities; and there is supporting evidence in the record showing various connections between United and Columbia.[4] We are not unaware that much less than a majority of stock is frequently sufficient for purposes of control, and we see no reason to contest the legislative view that 10% may be sufficient.[5]

Accordingly, the Commission was fully warranted in considering the question before it as one involving the relationship of petitioner on the one hand and U. G. I. and United on the other. In any event, the stock ownership of *each* of the holding companies and the evidence as to the par-

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[4] The record contains such evidence in the instant case, e. g., interlocking directorates between United and U. G. I. and an extensive history of concerted action relative to petitioner, beginning with United's formation in 1929.

[5] In a concurring opinion, L. Hand, J., stated (p. 333): "* * * quite aside from any implications from the statutory definition of 'subsidiary', § 2 (a) (8), I think we can take judicial notice of the fact that the ownership of twenty per cent of the voting power of a company makes the owner 'liable' to have practical control."

ticipation of *each* in petitioner's affairs, supports the Commission's ruling as to its inability to find that petitioner is not controlled, directly or indirectly, or that its management or policies are not subject to a controlling influence, directly or indirectly, by *each* of the holding companies. Contrary to petitioner's contention (Pet. 26), the Commission so concluded (R. 49):

> * * * we cannot find, as requested by the applicant, that it is not controlled by, or subject to the controlling influence of, United *or* U. G. I. * * * (Italics supplied.)

3. There is no substance to petitioner's contention that certiorari should be granted on the ground that the underlying issue in this case is whether petitioner shall be subjected to the integration and corporate simplification provisions of Section 11 of the Public Utility Holding Company Act (Pet. 12). Of course, petitioner's status as a subsidiary would subject it to the provisions not only of Section 11 but of the other sections of the Act applicable to subsidiaries. The application of the regulatory provisions of the Act to petitioner, however, is irrelevant in a proceeding for a declaration of status under the Act. Petitioner may not here, any more than was done in *Electric Bond & Share Co.* v. *Securities and Exchange Commission,* 303 U. S. 419, 443, invoke the application of the statute *in limine* in respect of all

its activities in a proceeding whereby it seeks to establish that it is not a subsidiary company.[6]

4. Finally, petitioner's contention that the Commission did not make its findings in proper form or sufficiently indicate its basic findings is without merit. Since petitioner's burden was to convince the Commission of the *absence* of control and controlling influence, it was unnecessary to make findings on all the requests presented. The Commission made the findings of fact summarized above (*supra*, pp. 3–8). These findings clearly indicated the basis for the Commission's conclusion that it was unable to find an absence of control and controlling influence by United or U. G. I. No more is required. *Swift & Co.* v. *National Labor Relations Board*, 106 F. (2d) 87, 94 (C. C. A. 10th).

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[6] The legislative history cited by petitioner appears to relate only to the interest evidenced by its representatives in the drafting of the exemption provisions of Section 3 (a) of the Act, on which it has relied as a basis for not registering as a *holding company*. These provisions are not now in issue. If the discussions cited could be construed as pertinent in any way to the question whether petitioner might be subject to the Act as a *subsidiary* of other holding companies, they indicate that at most Congress intended to provide a machinery by which absence of control or controlling influence could be established where the evidence warranted findings to that effect. Congress did not expressly exempt petitioner as a holding company or as a subsidiary of a holding company and merely provided an exemption of which petitioner *could take advantage if it could prove the factual prerequisites provided by Congress.*

CONCLUSION

The decision of the court below is correct. It turns substantially on the facts and presents no question worthy of further review. The petition should be denied.

Respectfully submitted.

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